No. 02-281 (12)

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In The
Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, Individually And As District Attorney; And DAN LUCAS, Individually And As Sheriff,

Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; And BISHOP PAIUTE GAMING CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, FLORIDA, IOWA, KANSAS, OKLAHOMA, OREGON, SOUTH DAKOTA, AND UTAH SUPPORTING REVERSAL

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General

*MARC A. LE FORESTIER
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 322-5452
Counsel for Amici Curiae
**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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WILLIAM H. PRYOR, JR.
Attorney General
State of Alabama

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

CHARLIE CRIST
Attorney General
State of Florida

THOMAS J. MILLER
Attorney General
State of Iowa

PHILL KLINE
Attorney General
State of Kansas

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

LAWRENCE E. LONG
Attorney General
State of South Dakota

MARK L. SHURTLEFF
Attorney General
State of Utah

QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian Tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the Tribe's civil rights that is actionable under 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
BRIEF OF *AMICI CURIAE*	1
INTEREST OF THE *AMICI CURIAE*	1
A. Historical background	2
B. The *Amici* States' immediate concerns	4
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. A TRIBE'S SOVEREIGNTY MAY NOT PREVENT THE STATE FROM PERFORMING THE CORE STATE FUNCTION OF EXECUTING A SEARCH WARRANT IN THE INVESTIGATION OF AN OFF-RESERVATION CRIME	10
A. The *Hicks* decision establishes that States and their subdivisions have inherent authority to execute search warrants upon Indian Tribes and their property	11
B. States did not relinquish authority to investigate off-reservation crimes anywhere within their territory as part of the constitutional bargain	18
C. The doctrine of tribal sovereign immunity has no applicability in the context of this case	20

TABLE OF CONTENTS – Continued

	Page
II. A TRIBE MAY NOT SUE UNDER § 1983 TO REMEDY AN ALLEGED INCURSION UPON A SOVEREIGN PREROGATIVE	24
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 20

Atkinson Trading Co. v. Shirley,
532 U.S. 645 (2001).....15

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991).....18, 24

Bugenig v. Hoopa Valley Tribe,
266 F.3d 1201 (9th Cir. 2001)..... 4

Cherokee Nation v. Georgia,
30 U.S. (5 Pet.) 1 (1831).....19

Confederated Salish and Kootenai Tribes of Flathead Reservation v. Moe,
392 F. Supp. 1297 (D. Mont. 1974) 27

District of Columbia v. Carter, 409 U.S. 418 (1973).....29

Duro v. Reina, 495 U.S. 676 (1990) 4

Elk v. Wilkins, 112 U.S. 94 (1884) 3

Federal Maritime Commission v. South Carolina State Ports Authority,
535 U.S. 743, 122 S.Ct. 1864 (2002) 18

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 19

Fort Leavenworth R. Co. v. Lowe,
114 U.S. 525 (1885)..... 8

Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995).....28

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997).....24

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).....19

TABLE OF AUTHORITIES – Continued

Page

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,
523 U.S. 751 (1998).....9, 22, 23, 24

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,
663 F. Supp. 682 (W.D. Wis. 1987).....27

Mitchell v. Forsyth, 472 U.S. 511 (1985).....22

Mitchum v. Foster, 407 U.S. 225 (1972).....26

Monell v. New York Dep't of Social Servs.,
436 U.S. 658 (1978).....25, 26

Monroe v. Pape, 365 U.S. 167 (1961).....25

Montana v. United States,
450 U.S. 544 (1981)..... 8, 11, 14, 15, 16

Nevada v. Hicks, 533 U.S. 353 (2001).....*passim*

New York v. United States, 505 U.S. 144 (1992).....20

Ngiraingas v. Sanchez, 495 U.S. 182 (1990) 28, 29

Nixon v. Fitzgerald, 457 U.S. 731 (1982).....21

Oliphant v. Schlie,
544 F.2d 1007 (1976).....13

Oliphant v. Suquamish Tribe,
435 U.S. 191 (1978)..... 4, 11, 12, 13

Puyallup Tribe, Inc. v. Department of Game of Washington,
433 U.S. 165 (1977).....24

Quinault Tribe v. Gallagher,
368 F.2d 648 (9th Cir. 1966).....27

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 24

TABLE OF AUTHORITIES – Continued

Page

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 20

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 15, 16

The Slaughter-House Cases, 83 U.S. 36 (1872) 26

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) 24

Turner v. United States, 248 U.S. 354 (1919) 23

United States v. Bryan, 339 U.S. 323 (1949) 21

United States v. Burr, 2 F. Cas. 30 (No. 14,692d) (Cir. Va. 1807) 21

United States v. Nixon, 418 U.S. 683 (1974) 21

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 23

United States v. Wheeler, 435 U.S. 313 (1978) 11, 13, 14

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 21, 22

Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) 28

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 17

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 28, 29

Williams v. Lee, 358 U.S. 217 (1959) 3, 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

Worcester v. Georgia, 6 Pet. 515 (1832) 12, 16, 19

Yakima Indian Nation v. Whiteside, 617 F. Supp. 735 (E.D. Wash. 1985) 27

CONSTITUTIONAL PROVISIONS

U.S. Const., Fourth Amendment 3

U.S. Const., Fifth Amendment 21

U.S. Const., Tenth Amendment 9, 20

U.S. Const., Eleventh Amendment 20

U.S. Const., Thirteenth Amendment 25

U.S. Const., Fourteenth Amendment, § 5 ..... 25, 26, 29

STATUTES

Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994) & 28 U.S.C. § 1360 (1994)) ("Public Law 280") .. 1, 3, 5, 16, 17

Indian Civil Rights Act of 1968 §§ 401-402, 25 U.S.C. §§ 1321-1322 (1994) 1

8 Stat. 82 19

14 Stat. 27 25

17 Stat. 13 25

24 Stat. 388 (1887) 3

43 Stat. 253 (1924) 3

48 Stat. 984 (1934) 3

72 Stat. 619-621, Pub. Law 85-671 3

78 Stat. 390-91, Pub. Law 88-419 3

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. § 1401(b) 3

18 U.S.C. § 1162 ..... 2, 17

25 U.S.C. §§ 1321-1322 1

42 U.S.C. § 1983 ..... *passim*

OTHER AUTHORITIES

Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441 (1989) 25

Bureau of Census, Dep't of Commerce, 1990 Census of Publication, General Population Characteristics, United States 541 (Nov. 1992) 4

Fed. R. Evid. 201(b) 6

H.R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953) 3

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002) 6

The Federalist No. 42 (James Madison) 18

Francis Paul Prucha, *The Great Father 896* (1984) 3

8 Wigmore, Evidence § 2192 (McNaughton rev. 1961) 21

BRIEF OF *AMICI CURIAE*

The States of California, *et alia*, respectfully submit their brief as *amici curiae* through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The *Amici* States address only the first two questions presented by Petitioners and urge reversal of the decision below.

INTEREST OF THE *AMICI CURIAE*

The decision below poses a real threat to the integrity of *Amici* States' sovereignty reserved by them under the Constitution, and in particular to their inherent authority to discharge the day-to-day governmental responsibility to seek and seize evidence of criminal activity. All *Amici* States are obligated to provide governmental services to Indians and non-Indians – including the investigation of criminal law violations outside Indian country. Such investigations may, as here, require *Amici* States to act within the boundaries of Indian country. The *Amici* States with criminal authority under Public Law 280[1] must also

[1] Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994) & 28 U.S.C. § 1360 (1994)) ("Public Law 280"). Public Law 280 required six States to assume broad jurisdiction over criminal law and civil adjudication in Indian country. Other States may choose to assume Public Law 280 authority, but that choice is currently conditioned on tribal approval. *See* Indian Civil Rights Act of 1968 §§ 401-402, 25 U.S.C. §§ 1321-1322 (1994). Public Law 280's criminal jurisdiction provisions read, in relevant part, as follows:

> (a) Each of the States ... shall have jurisdiction over offenses committed by or against Indians in the areas of

(Continued on following page)

enforce their criminal laws within Indian country. In addition, the expansion of tribal gaming under the Indian Gaming Regulatory Act of 1988, and the development of other tribal enterprises, has brought tribal and non-tribal communities into closer and more regular contact. All *Amici* States are thus required to have substantial and ever more frequent contacts with Indian Tribes, on tribal lands. The decision below would allow Tribes to prevent the investigation of off-reservation crime – thereby frustrating a core state function. Such a rule of decision would add a twist to the already troubled history of state jurisdiction in Indian country that is incompatible both with this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) ("*Hicks*") and with the expectations of the States in joining the Union.

A. Historical background

Much of the confusion surrounding the scope and extent of tribal and state jurisdiction over Indian country is the result of dramatic shifts in the federal government's Indian policies over the last two hundred years. Following independence, the United States retained the British Crown's concept of Indian country, which drew a line along the Appalachian Ridge – west of which the Sovereign claimed to exercise no political control. Later, the federal

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> Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State.

18 U.S.C. § 1162.

government segregated Tribes by placing them on reservations that non-Indians were prohibited from entering without permission from the federal government. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (denying Indians personhood under the Fourth Amendment). Next, the federal government attempted to assimilate Tribes into non-Indian society by abolishing reservations and tribal governments and selling tribal land to individuals. General Allotment Act, 24 Stat. 388 (1887). In the first half of the Twentieth Century, when the failure of the "allotment policy" was clear, the federal government began restoring its relations with tribal governments and returning lands to Tribes. Indian Reorganization Act of 1934, 48 Stat. 984 (1934). And for a brief time in the 1950's, Congress again pursued a policy of tribal termination that was typified both by the California Rancheria Act of 1958, Pub. Law 85-671, 72 Stat. 619-621, as amended in 1964, Pub. Law 88-419, 78 Stat. 390-91, and by Public Law 280 itself. *See Williams v. Lee*, 358 U.S. 217, 220 (1959); H.R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953).

The effects of these policy fluctuations over time have been enormous. Under the allotment policy, for example, a substantial portion of reservation land passed out of tribal ownership. *See generally* Francis Paul Prucha, *The Great Father* 896 (1984) (summarizing the types and amounts of land transferred by 1934). Accompanying this destruction of exclusive tribal territory was the elimination of tribal members' political separation through individual grants of United States citizenship in conjunction with the allotment process and, eventually, the extension of citizenship to all Indians in 1924. Act of June 2, 1924, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)). In time, Indian country was transformed from territory clearly

separate from that of the dominant culture, to territory in which Indian and non-Indian lands are jumbled together and the boundaries between them uncertain. Non-Indians residing on former tribal lands may find themselves subject to claims of regulatory or taxing authority by tribal governments in which they have no right to participate. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001). Meanwhile, tribal governments do not provide the full panoply of services and protections one generally expects a state government to provide. For example, tribal governments are barred from enforcing criminal laws against non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Consequently, tribal members also look to States and their political subdivisions to provide governmental services, including the provision of law enforcement services. *See Duro v. Reina*, 495 U.S. 676, 680-81, n.1 (1990) (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country). The uncertainties attending these jurisdictional concerns affect all citizens, including a significant population within Indian country. The 1990 census indicates that approximately 800,000 persons resided within Indian reservations or on trust land, of whom only 54.1 percent were identified as American Indian, Eskimo or Aleut. Bureau of Census, Dep't of Commerce, 1990 Census of Population, General Population Characteristics, United States 541 (Nov. 1992).

B. The *Amici* States' immediate concerns

This case raises immediate practical concerns for Californians and for the residents of the other *Amici* States. First, giving effect to the Tribe's claim of an immunity that may bar the execution of a state search warrant

would establish an impractical and unworkable obligation upon law enforcement officers, requiring them to first determine whether a tribal government has an interest in land and/or in property that is the subject of a warrant, prior to its issuance. Additionally, the Tribe's claimed right to vindicate a sovereign power by holding state law enforcement officers personally liable under 42 U.S.C. § 1983 will chill the conduct of on-reservation law enforcement activities in all States – regardless of the situs of the crime being investigated. It is generally the case in California and in other Public Law 280 States – where the federal government has no regular law enforcement presence – that county sheriffs are the only providers of law enforcement within Indian country. A ruling adverse to the Petitioners here will provide a strong disincentive to sheriffs' deputies considering entering Indian country – possibly with profound public safety implications for reservation populations.[2]

This case also raises the specter of Indian country becoming a safe haven for criminals. Not only would the Tribe's claimed sovereign power to bar the execution of a state warrant allow criminals to operate untouched when cloaked by an official designation of tribal governmental status, but criminals anywhere within Indian country would benefit if the law enforcement community became unwilling to enter Indian country for fear of the personal liability that might attach to an inadvertent incursion

[2] The federal government recognized this practical concern in briefing submitted to this Court in *Nevada v. Hicks*. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, 2001 WL 28669, at *19-*22.

upon the land or property of the tribal government. The geographical scope of this specter is substantial. Within the ten continental States of the Ninth Circuit, there are 398 Indian Tribes occupying approximately thirty-six million acres of territory. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). In California alone, the Bureau of Indian Affairs has before it eighty-seven pending applications for the acceptance of land into trust for the benefit of Indian Tribes, totaling approximately 9,000 acres. *Internal BIA Memorandum*, October 11, 2002.[3] Under the court of appeals' decision below, any number and variety of criminal enterprises could conceal themselves within Indian country, beyond the effective reach of the state police power.

The *Amici* States' interest in this case is clear. It presents the Court with an opportunity to confirm that States of the Union have inherent authority to investigate off-reservation crimes – wherever the investigation may lead them within their territory. The decision below effects an ill-conceived and unwarranted extension of the concept of tribal sovereign immunity and erroneously grants to the Tribe previously unrecognized authority to bar the prosecution of an otherwise legitimate criminal investigation and to hold law enforcement officers personally liable for any abridgement of that purported authority. For these reasons, the *Amici* States respectfully request that the

[3] The memorandum is an appropriate subject of judicial notice. Fed. R. Evid. 201(b). Twelve copies of the memorandum have been lodged with the Clerk's Office.

decision below be reversed with instructions to the district court to dismiss the action with prejudice.

SUMMARY OF ARGUMENT

This case involves the execution by county officers of a search warrant, issued on probable cause in the course of an investigation of an off-reservation crime, commanding the search of tribally-owned buildings located within the Tribe's reservation, and requiring the seizure of specified tribal business records. When this case is considered either from the perspective of an Indian Tribe's authority to regulate the on-reservation conduct of non-Indians, or from the perspective of a State's authority over an Indian reservation within its territory, the rule must be the same – that tribal sovereignty may not prevent a State from investigating, anywhere within its territory, an off-reservation crime. This rule is mandated because a Tribe may not, consistent with its dependent status, bar a State from performing a core state function, and because the imposition of such a limitation upon the State would violate the constitutional bargain accepted at statehood. Accordingly, neither the concept of tribal "sovereign immunity," nor any other attribute of tribal sovereignty, may operate as a bar to the execution of a state search warrant.

The issues presented in this case were resolved by this Court's decision two terms ago in *Nevada v. Hicks*, 533 U.S. 353 (2001). In *Hicks*, the State of Nevada and state officials brought a declaratory relief action in federal court against a member of the Fallon Paiute-Shoshone Tribes of Western Nevada and the Tribal court. *Id.* at 357. The

State challenged the tribal court's jurisdiction over the tribal member's § 1983 civil rights action against state officials, in their individual capacities, who had executed a search warrant on allotted land within a reservation for evidence of an off-reservation poaching crime. *Hicks, supra*, 533 U.S. at 355-57. This Court concluded that neither the Tribe's inherent sovereignty, nor its delegated authority, allowed it to "regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Id.* at 358. Nothing in *Hicks* suggests that the conduct at issue in this case fell outside the scope of the State's inherent authority. To the contrary, the Court has indicated that States have a right to enter reservations for enforcement purposes so as "'to prevent [such areas] from becoming an asylum for fugitives from justice.'" *Hicks*, 533 U.S. at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885)).

Although the Court in *Hicks* concluded that its decision was dictated by the *Montana v. United States* line of authority, which governs the scope of tribal authority to regulate non-Indians, *Hicks* is also predicated upon a State's inherent authority over tribal lands. *Hicks*, 533 U.S. at 358 (citing *Montana v. United States*, 450 U.S. 544 (1981)). An examination of the history and structure of American federalism reveals that whatever authority is vested in the federal government by virtue of the Commerce Clause, it does not include the cession of any state power to investigate an off-reservation state crime anywhere within state territory. Accordingly, such state

authority is reserved to the States by operation of the Tenth Amendment.[4]

There is also simply no conceivable basis for the court of appeals' determination that the Tribe's "sovereign immunity" would bar the execution of a state search warrant. The doctrine of tribal sovereign immunity is implicated only when an effort is made to hale a Tribe into court. As Justice Kennedy indicated in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, while "tribal immunity [from suit] extends beyond what is needed to safeguard tribal self-governance" that immunity is limited to freedom "'from judicial attack' absent consent to be sued." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998) ("*Kiowa*"). However, a search warrant does not constitute "judicial attack" upon the Tribe, but merely directs *county officers* to search for property and seize it, if found. No decision of this Court has construed tribal sovereign immunity to include an immunity from the service of process or the execution of a search warrant.

This case also presents an unprecedented effort by the Tribe to vindicate a purported incursion upon its sovereignty under a statute intended to provide a remedy for the violation of *individual* rights. Even assuming that this Court's *Hicks* decision could be meaningfully distinguished from this case, and further that the execution of the search warrant violated the Tribe's sovereign immunity, the *Tribe*

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[4] Although the Tenth Amendment generally reflects aspects of the federal-state relationship, it also sheds light on the state-tribal relationship in this context.

may not sue the county officers for a violation of an attribute of its sovereignty under 42 U.S.C. § 1983. The plain language, legislative history, and the purposes of § 1983 all establish that a sovereign entity is not a "person" within the meaning of the statute. Therefore, the Tribe, when seeking vindication for a purported incursion upon its sovereign powers, has no standing under § 1983.

ARGUMENT

I. A TRIBE'S SOVEREIGNTY MAY NOT PREVENT THE STATE FROM PERFORMING THE CORE STATE FUNCTION OF EXECUTING A SEARCH WARRANT IN THE INVESTIGATION OF AN OFF-RESERVATION CRIME

This case concerns whether, and to what extent, the State's authority to investigate off-reservation violations of the State's criminal laws – a necessary and inherent component of state sovereignty – is diminished by tribal sovereignty as a matter of constitutional law. The decisions of this Court, and the inherent powers of States as reflected in the Constitution's federal structure, indicate that the State's authority to conduct such investigations is not diminished by tribal sovereign powers. In 2001, this Court held in *Nevada v. Hicks* that state game wardens executing a search warrant upon a residence located on allotted lands within an Indian reservation were not subject to tribal court jurisdiction because the Tribe was without authority to impair the search for evidence of an off-reservation crime. *Nevada v. Hicks*, 533 U.S. at 374-75. *Hicks* is dispositive of the issues presented here.

A. The *Hicks* decision establishes that States and their subdivisions have inherent authority to execute search warrants upon Indian Tribes and their property

Although this case arises in a different procedural posture, the underlying facts here are strikingly similar to those presented to the Court in *Nevada v. Hicks*. Both cases involve a proper exercise of what the *Hicks* decision deemed to be the State's "inherent jurisdiction" on reservations to execute a search warrant in the investigation of an off-reservation crime. *Hicks*, 533 U.S. at 365. There are no meaningful distinctions between these cases.

Hicks is the progeny of well-settled authority that establishes "that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers of the tribe." *Hicks*, 533 U.S. at 358-59 (following *Williams v. Lee*, 358 U.S. 217 (1959) ("*Williams*"), *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) ("*Oliphant*"), *United States v. Wheeler*, 435 U.S. 313 (1978) ("*Wheeler*"), and *Montana*, 450 U.S. at 544). These decisions all establish the bounds of tribal sovereign authority over non-Indians as follows: "[w]here nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation.'" *Hicks*, 533 U.S. at 359 (quoting *Montana v. United States*, 450 U.S. at 564, emphasis added in *Hicks*). Here, as in *Hicks*, the Tribe's efforts to bar the execution of the County search warrant did not serve to protect tribal self-government, promote control of internal relations, or

promote any other legitimate tribal interest. It was therefore incompatible with the dependent status of the Tribe.

In *Williams v. Lee*, this Court ruled that an Arizona court lacked jurisdiction over a civil suit brought by a non-Indian against an Indian where the cause of action arose on the reservation and the Tribe had a sophisticated legal system that exercised broad civil jurisdiction over disputes brought by outsiders against Indian defendants. *Williams*, 358 U.S. at 223. The Court recognized that the principles first articulated by Justice Marshall in *Worcester v. Georgia* have been modified over time and that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams, supra*, 358 U.S. at 220 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the Cherokee Nation is a distinct community, occupying its own territory in which the laws of Georgia have no force and into which the citizens of Georgia have no right to enter)). Under the unique circumstances presented by the Navajo Nation in *Williams*, the Court ruled that Arizona's exercise of civil jurisdiction over an on-reservation claim would indeed infringe upon the Tribe's right "to make their own laws and be ruled by them." *Id.* at 220. Indeed, recognition of the right of Tribes to make their own laws and be ruled by them remains a touchstone for determining the appropriate scope of tribal authority over non-member conduct. *Hicks*, 533 U.S. at 360-61. It is the basis of the Court's determination that Indian Tribes lack inherent criminal jurisdiction to try or punish non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 212, and of the rule that the power to punish *tribal members* for criminal offenses is an attribute of

retained tribal sovereignty, *United States v. Wheeler*, 435 U.S. at 323-24.

Although in *Williams*, Arizona's exercise of civil jurisdiction was barred, the Court's reasoning restrained the scope of tribal authority over non-Indians. In adopting the reasoning of *Williams*, both *Oliphant* and *Wheeler* expressly recognized the limited nature of tribal sovereignty. In *Oliphant*, then-Associate Justice Rehnquist noted that "Indian tribes are prohibited from exercising the powers of autonomous States that are expressly terminated by Congress *and* those *'inconsistent with their status.'*" *Oliphant*, 435 U.S. at 208 (alteration in original) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)). In *Wheeler*, Justice Stewart, for a unanimous Court, noted that Indian Tribes possess only those aspects of sovereignty not withdrawn by treaty or statute, or "by implication as a necessary result of their dependent status." *Id.* at 323. The Court distinguished between Tribes' retained inherent powers and divested powers as follows:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only *the relations among members of a tribe*. Thus, they are not such powers as would

> necessarily be lost by virtue of a tribe's dependent status.

United States v. Wheeler, 435 U.S. at 326.

Three years later, in *Montana v. United States*, 450 U.S. 544, Justice Stewart elaborated upon *Wheeler*. *Montana* involved an attempt by the Crow Indian Tribe to prohibit hunting and fishing activities by non-Indians on lands within the boundaries of the Tribe's reservation, but owned in fee by non-Indians. *Id.* at 547. The Court held that the Tribe's attempt to regulate such hunting and fishing bore "no clear relationship to tribal self-government or internal relations" and was not compatible with "general principles of retained inherent sovereignty." *Montana*, 450 U.S. at 564-65. Yet *Montana* does indicate that in addition to the punishment of tribal members, "Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, . . . to prescribe rules of inheritance for members" and to exercise civil authority over non-Indians within a reservation when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 564 (identifying *Montana*'s "second exception" to the rule that the inherent powers of Tribes do not extend to non-members).[5] More recent decisions of this Court are in accord with the notion that the *Montana* decision defines the outer perimeter of tribal sovereignty over non-Indian

[5] The "first *Montana* exception" covers the "activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

conduct. *See Strate v. A-1 Contractors*, 520 U.S. 438, 456, 459 (1997) (following *Montana* and holding that a tribal court could not entertain a civil action against non-members absent a federal statute or treaty granting such authority to the Tribe); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 646 (2001) (holding that the *Montana* rule that inherent sovereign powers of an Indian Tribe do not extend to non-Indians was applicable to prohibit the Navajo Nation's attempt to tax guests of a non-Indian-owned hotel located on fee lands within the boundaries of the reservation). The *Strate* decision, in particular, presaged the result in *Hicks*. In *Strate*, this Court rejected a Tribe's efforts to assert adjudicatory jurisdiction over a traffic accident involving non-Indians within a section of State highway on a right-of-way running through an Indian reservation. *Strate*, 520 U.S. at 442-43. Writing for an unanimous Court, Justice Ginsberg clarified that the scope of a Tribe's inherent powers do not reach "beyond what is necessary to protect tribal self-government or to control internal relations" and ruled that "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459.

Thus, the Court in *Hicks* indicated that the proper question presented by the execution of the search warrant was "whether regulatory jurisdiction over state officers . . . is 'necessary to protect tribal self-government or to control internal relations,' and, if not, whether such regulatory jurisdiction has been congressionally conferred." *Hicks*, 533 U.S. at 360. In *Hicks*, the Court considered the powers that are necessary for a Tribe to protect self-government and control internal relations to be those referred to in

Montana: "tribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'" *Hicks*, 533 U.S. at 360-61 (quoting *Strate v. A-1 Contractors*, 520 U.S. at 459). Balanced against these recognized tribal interests, the Court noted that inherent tribal authority does not exclude all state regulatory authority on the reservation. *Hicks*, 533 U.S. at 362. To the contrary, generally an Indian reservation is considered part of the territory of the State and so "state sovereignty does not end at a reservation's border," and when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. . . . " *Hicks*, 533 U.S. at 361-62 (recognizing that the Court long ago departed from the platonic notions of tribal sovereignty articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. at 561).

In *Hicks*, this Court concluded that the power to regulate state officers in the execution of process related to the off-reservation violation of state law is not essential to tribal self-government or internal relations, but that such state jurisdiction over reservations is "inherent," and carries with it authority for state officers to execute process on tribal lands. *Id.* at 363-65. "The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the Tribe's self-government than federal enforcement of federal law impairs State government." *Id.* at 364.

The only noteworthy factual distinctions between this case and *Hicks* are that the location searched and the property seized belonged to a Tribe, and that California is a Public Law 280 State. However, these factual distinctions would not justify an outcome different from *Hicks*.

First, the Court has never distinguished between tribal members and Tribes when determining the scope of state authority within Indian country. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147 (1980) (applying a balancing test and holding that the State of Washington's imposition of sales taxes upon tribally-operated cigarette sales was valid). And for reasons identified in section B below, giving this distinction any prejudicial effect to state interests would be inappropriate. Moreover, the fact that California is a Public Law 280 State is analytically irrelevant.[6] However, to the extent California's Public Law 280 status should inform the Court's review, it actually militates against Respondents' position because Public Law 280 provides California with express authority to enforce state criminal laws within Indian country. Thus, the enactment of 18 U.S.C. § 1162 demonstrates Congress' determination that *federal* interests are furthered by comprehensive state

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[6] The Ninth Circuit's analysis is distorted by the faulty premise that Public Law 280 governs the exercise of all state law enforcement activity within Indian country – even that which relates to the commission of an off-reservation crime. *Bishop Paiute*, Pet. App. 16a. Through this clouded lens, the court of appeals analyzed the lawfulness of the county's execution of the search warrant in terms of whether Congress intended to abrogate tribal sovereign immunity under Public Law 280. But Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime. Public Law 280 grants that, "Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . . " 18 U.S.C. § 1162(a). *See also Hicks*, 533 U.S. at 366 (noting that Public Law 280 applies only to crimes committed in Indian country).

criminal jurisdiction – this determination is irreconcilable with the notion that tribal lands may be a safe haven for evidence of off-reservation criminal activity. Accordingly, this action is controlled by *Hicks*.

B. States did not relinquish authority to investigate off-reservation crimes anywhere within their territory as part of the constitutional bargain

The federal structure of the United States Constitution provides a critical insight into the proper resolution of this case, and indicates that States must have retained their authority to investigate off-reservation crimes everywhere within their territory – including within reservation land. The conclusion reached in *Hicks*, that States have inherent authority to execute a search warrant on tribal property, is wholly compatible with, and indeed mandated by, the nature of American federalism and of Indian Tribes' dependant status. Any other conclusion would detract from retained State sovereignty. The "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 1870 (2002) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

Congress' plenary authority over Indian affairs under the Indian Commerce Clause is derived from the several States. The Federalist No. 42, at 282 (James Madison) (describing Commerce Clause authority as part of the "third class" of powers lodged in the general government). Accordingly, if it were not for the States' delegation of

authority to regulate commerce "with the Indian tribes," the States would retain the same plenary authority. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). Since Chief Justice Marshall's seminal trilogy of Indian law decisions, Indian Tribes have been understood to be "domestic dependent nations" with a relationship to the federal government that resembles that of a "ward to his guardian." *Worcester v. Georgia*, 31 U.S. at 515; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Johnson v. M'Intosh*, 21 U.S. at 543. Conceptually, the federal guardianship over Indian Tribes was passed from the British Crown in the 1783 Treaty of Paris, through the separate States upon adoption of the Constitution, to the federal government. Definitive Treaty of Peace, United States-Great Britain, 8 Stat. 82; *see Johnson v. M'Intosh*, *supra*, 21 U.S. at 584-85; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting). It also follows that, as sovereigns succeeding to Great Britain's territorial sovereignty, the States have had inherent authority to perform core governmental functions, like the investigation of crimes, throughout their territory from the time of the Constitution's framing.

To the extent the constitutional design demonstrates that the States did not cede power to the federal government, it is retained by the States, and so could not be preempted by the exercise of tribal sovereignty. The authority of the States to conduct investigations of off-reservation crimes anywhere within their territory is one such retained state power. Because it is doubtful that even Congress would have authority under the Indian Commerce Clause to prevent States from investigating off-reservation crimes, endowing tribal sovereign immunity with such an effect would be extremely imprudent. Article

I is subject to the constraints of not only the Tenth and Eleventh Amendments, but also to those fundamental attributes of state sovereignty that are implicit in the constitutional design. *See Alden v. Maine*, 527 U.S. 706, 713, 730 (1999) (Congress may not abrogate States' immunity from private suit in state court under a statute enacted pursuant to its Commerce Clause powers); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59-63 (1996) (Eleventh Amendment precludes Congress from subjecting States to unconsented suits by Indian Tribes under the Indian Gaming Regulatory Act and the Indian Commerce Clause); *New York v. United States*, 505 U.S. 144, 167-69 (1992) (Congress lacks authority directly to compel the States to require or prohibit acts identified in federal legislation). Although these constitutional provisions govern relations between the federal government and the States, they are illustrative of residual state power. Accordingly, there is simply no constitutional basis for the conclusion that the States have relinquished inherent state jurisdiction to investigate crimes occurring beyond the borders of Indian country to Indian Tribes – even when the investigation leads onto an Indian reservation.

C. The doctrine of tribal sovereign immunity has no applicability in the context of this case

The Tribe's sovereign immunity does not provide it with authority to bar the execution of a search warrant by County officers. The court of appeals' decision below, finding that sovereign immunity provides such authority, *Bishop Paiute*, Pet. App. 42a, n.7, is rooted in a misconception of the nature of tribal sovereign immunity – both with

respect to the authority it provides and the extent to which it may be applied against a State exercising core functions. First, sovereign immunity is an immunity from suit, not an immunity from service of process, the execution of which implicates no legitimate sovereign interest. *See Nixon v. Fitzgerald*, 457 U.S. 731, 759 (1982) ("It is one thing to say that a President must produce evidence relevant to a criminal case, as in [*United States v.*] *Burr* [25 F.Cas. 30 (No. 14,692d) (Cir. Va. 1807)] and *United States v. Nixon*, [418 U.S. 683, 706 (1974),] and quite another to say a President can be held for civil damages for dismissing a federal employee").[7] In *Van Cauwenberghe v. Biard*, a civil defendant moved for dismissal on the ground that he had been immune from service of process because his presence in the United States had been

[7] An analogy may be found in the concept of executive privilege. *See United States v. Nixon*, 418 U.S. 683, 706 (1974) (holding that neither the doctrine of separation of powers nor the need for confidentiality of high-level communications can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances). In *United States v. Nixon*, this Court upheld the denial of President Nixon's motion to quash a subpoena duces tecum for audio tapes and documents sought by the United States Attorney General during the Watergate investigation. *United States v. Nixon*, 418 U.S. at 684. In rendering its decision, the Court remarked upon the "ancient proposition of law" that "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *Id.* at 709 (citing *United States v. Bryan*, 339 U.S. 323, 331 (1949) (quoting 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961)). These privileges, Chief Justice Burger noted, are those "weighty" interests addressed in the Fifth Amendment protection against compelled self-incrimination, and in the attorney-client and priest-penitent relationship. *Id.* at 709-10. "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for, they are in derogation of the search for truth." *Id.* at 710.

compelled by extradition to face criminal charges. However, this Court noted that, "[t]he critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)), and held that the immunity from service of process defendant asserted was not an immunity from suit – even though service was essential to the trial court's jurisdiction over the defendant. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988). The search warrant executed by the County officers in this case did not hale the Tribe into state court, and so did not infringe on the Tribe's immunity from suit. To the contrary, the search warrant merely engaged County officers in the search for truth by commanding them to seek evidence of an off-reservation crime.

Nor does the Court's most recent decision on the scope of tribal sovereign immunity support its exercise in the context of this case. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Court extended for the first time a Tribe's sovereign immunity from suit to an action arising from the Tribe's off-reservation commercial activities. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 764 (1998) (Stevens, J., dissenting) (Tribe entitled to sovereign immunity from suit in state court on promissory note regardless of whether it was signed on or off the reservation). However, in doing so, the Court noted that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. In particular, the Court noted that in "our interdependent and mobile society, . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." *Id.* Particularly in this

context, expanding the scope of the tribal sovereign immunity doctrine to include a never-before-recognized power to bar state investigations of off-reservation crimes would be imprudent. If the decision below is not overturned, Tribes might argue in future cases that, because the *Kiowa* decision recognizes tribal sovereign immunity to insulate Tribes from suits arising from their off-reservation commercial activities, tribal sovereign immunity may also bar the execution of a search warrant directed at off-reservation land and property owned by the tribal government. Such reasoning would presumably allow the creation of an asylum for fugitives *anywhere* within a State, provided a tribal government claimed an interest in the subject of the search.[8]

Furthermore, the peculiar origins of the doctrine of tribal sovereign immunity suggest that this case would be an inappropriate vehicle for a further expansion of the doctrine's scope. Though the doctrine of tribal immunity is settled law, this Court noted in *Kiowa* that it "developed almost by accident." *Kiowa*, 523 U.S. at 756. Justice Kennedy described tribal sovereign immunity as having emerged from a misapplication of *Turner v. United States*, 248 U.S. 354 (1919), the Court's later decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), and Congress' acceptance of the doctrine and reliance upon the Court's many decisions in which the doctrine was reiterated. *Kiowa*, 523 U.S. at 756-58. *See,*

[8] The States do not intend to suggest that tribal governments would necessarily be, or are likely to be, criminal conspirators. However, these concerns would also be relevant in the context of non-tribal member criminals taking advantage of, for example, commercial dealings with tribal governments to conceal evidence of off-reservation crimes – even without the consent or knowledge of the tribal government.

e.g., Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-891 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, 433 U.S. 165, 167 (1977). In light of these decisions, tribal sovereign immunity's origins in federal common law, and Congress' better vantage point to consider the policies implicated by the doctrine of tribal sovereign immunity, this Court declined in *Kiowa* to modify the doctrine and instead deferred to Congress to alter its limits through explicit legislation. *Kiowa*, 523 U.S. at 759-60, 763 (Stevens, J., dissenting). Similarly, the Court should not allow any judicial expansion of the docterine here.

Finally, and perhaps more fundamentally, because tribal sovereign immunity is merely one twig within the Tribe's bundle of sovereign powers, it would indeed be paradoxical to conclude that tribal sovereign immunity could exceed the scope of tribal sovereignty itself. From the discussion in Sections I.A and I.B, above, it is established that tribal authority may not bar the execution of a search warrant in the investigation of an off-reservation crime. Accordingly, neither may the doctrine of tribal sovereign immunity.

II. A TRIBE MAY NOT SUE UNDER § 1983 TO REMEDY AN ALLEGED INCURSION UPON A SOVEREIGN PREROGATIVE

For all the reasons stated in Section I, above, the Tribe's claim that its sovereign immunity bars the execution of a search warrant is without merit and the actions

of the County officers did not violate any federal law. Setting aside the infirmity of the Tribe's claims for the purposes of discussion, even if the Tribe establishes a violation of federal law, it may not seek damages for the purported incursion upon a *sovereign prerogative* under a statute intended to redress the most grievous violations of *individual rights*. This Court should rule that the Tribe's status as a domestic dependent sovereign, upon which status rests the Tribe's claim that its sovereign immunity has been violated, perforce deprives the Tribe of standing as a "person" within the meaning of 42 U.S.C. § 1983 when the Tribe is seeking vindication of a sovereign interest.

Section 1983 originated in section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and § 1 of the Civil Rights Act of 1871, Ch. 22, 17 Stat. 13 (now codified as amended at 42 U.S.C. § 1983). Commonly referred to as the Ku Klux Klan Act, § 1983 was enacted by Congress to provide a federal statutory "sword" in enforcing the Thirteenth and Fourteenth Amendments. *See* Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441 (1989). In *Monroe v. Pape*, the Court confirmed that the Reconstruction Congress intended to provide a cause of action for violations of constitutional rights committed by "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961), overruled in part by *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658 (1978).[9]

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[9] In *Monell*, the Court determined that the legislative history of the Civil Rights Act of 1871 compelled the conclusion that Congress intended municipalities and other local government units to be included

(Continued on following page)

The purposes of the Fourteenth Amendment were first explained by this Court in *The Slaughter-House Cases*, in which the Court ruled that the Equal Protection Clause of the Fourteenth Amendment was never intended to protect business or contractual interests from an exercise of a State's police powers. *The Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872). This decision was rooted in the understanding that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Fourteenth Amendment], and by it such laws are forbidden." *Id.* at 81. Section 1983 was expressly authorized in the final section of the Fourteenth Amendment, U.S. Const., amend. XIV, § 5, and was intended to provide a remedy when States failed to conform their laws to the Fourteenth Amendment's requirements. *Id.*

This understanding of the historic purposes of § 1983 was confirmed by the Court in *Mitchum v. Foster*: "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Though § 1983 has, since *The Slaughter-House Cases*, been used to remedy a broad range of *individual* rights

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among those "persons" who are subject to suit under § 1983 – owing to their corporate nature. *Monell*, 436 U.S. at 688-90.

violations, there is no precedent, other than the decision below, for § 1983 being recognized as a remedy for a perceived violation of an attribute of sovereignty. Those lower court decisions permitting Tribes to bring § 1983 actions did not involve purported violations of a sovereign power or did not address whether Tribes are "persons" within the meaning of § 1983. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 663 F. Supp. 682, 686 (W.D. Wis. 1987) (Tribe is a person under § 1983 in action involving Tribe's enforcement of communal hunting and fishing rights "on behalf of its members"); *Confederated Salish and Kootenai Tribes of Flathead Reservation v. Moe*, 392 F. Supp. 1297 (D. Mont. 1974), *aff'd*, 425 U.S. 463 (1976) (no consideration to Tribe's status as a "person" under § 1983 in claim for violation of Commerce Clause rights); *Quinault Tribe of Indians of the Quinault Reservation v. Gallagher*, 368 F.2d at 653 (dismissed on other grounds); *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 747, n.13 (E.D.Wash.1985) (noting, without deciding, that it is a "novel question" whether Tribes are persons within the meaning of § 1983).

Section 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity [or] . . . . " 42 U.S.C. § 1983. It is established beyond any doubt that under § 1983, a sovereign or a governmental entity is not subject to suit as a "person"

within the meaning of the statute. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989) (stating that neither States nor state officials acting in their official capacity are "persons" *subject* to suit under § 1983). There is no reason to believe that the term "person" was intended by Congress to have two different meanings within the same sentence of § 1983. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 597 (1995) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning"). Accordingly, if "person" within the meaning of § 1983 may not include a governmental entity for the purpose of being subjected to suit, presumably it does not include a governmental entity for the purpose of bringing suit either.

Although this Court's leading precedent establishing that a State is not a "person" within the meaning of § 1983 related to the State of Michigan's status as a defendant, the decision's discussion of concepts of sovereignty is just as applicable to Indian Tribes and to the concept of tribal sovereignty. *Will*, 491 U.S. 58, 71. This Court has noted that in common usage the term "person" does not include a sovereign, and statutes employing the word "person" are ordinarily construed to exclude sovereigns. *Id.* at 64. *See also Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 780-81 (2000) (noting that the Court's "longstanding interpretive presumption that 'person' does not include the sovereign" and that although "the presumption is, of course, not a 'hard and fast rule of exclusion,' ... it may be disregarded only upon some affirmative showing of statutory intent to the contrary."). In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), the Court's review of § 1983's legislative history led it to determine that the Territory of Guam is not a "person" within the

meaning of the statute. The Court found that Congress was concerned with enforcing the provisions of the Fourteenth Amendment and in particular was concerned about the insecurity of life and property in the South during the Era of Reconstruction. *Id.* at 187-88. "[T]he remedy provided by § 1983 was designed to combat the perceived evil. . . . 'Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.'" *Id.* at 189 (quoting *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973)). The Court in *Ngiraingas* also relied upon the Dictionary Act, which originally defined "person" to include the phrase "bodies politic and corporate." However, the Act's amendment in 1874 omitted those three words and substituted "partnerships and corporations," eliminating any confusion that the word "person" may be generally understood to include sovereign political entities. *Id.* at 190-91; *see also Will*, 491 U.S. at 69 ("[W]e disagree with Justice BRENNAN that at the time the Dictionary Act was passed 'the phrase "bodies politic and corporate" was understood to include the States.' ... Rather, an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States. ... (In our view, the Dictionary Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable).")

The text, legislative history and purposes of § 1983 establish that Congress excluded sovereignties from the definition of "person." The Ninth Circuit's conclusion to the contrary should be reversed.

CONCLUSION

The *Amici* States urge the Court to reverse the decision of the Ninth Circuit Court of Appeals below.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General

*MARC A. LE FORESTIER
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 322-5452
Counsel for Amici Curiae
**Counsel of Record*

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